

Outside Counsel Selection Policy

This establishes Division-wide policies and procedures for selecting and retaining Outside Counsel. These procedures apply to all sections of the Legal Division and must be exercised consistent with the most recent issuance of the Delegations of Authority from the Board of Directors to the Legal Division for retaining and paying Outside Counsel. These procedures may be modified, as necessary, with authorization from the General Counsel.

Use of In-House Legal Staff and Retention of Outside Counsel

The Legal Division of the FDIC utilizes in-house staff to the extent practicable to provide legal services and support to the entire Corporation in all legal matters including, but not limited to, litigation, transactional corporate, open bank, appellate and professional liability matters. The management of the Division assesses the number and type of staff which can be efficiently utilized in a cost-effective manner to support the conduct of legal services in-house. All reasonable efforts are undertaken to staff matters in-house before retaining Outside Counsel.

Where the Division does not have sufficient resources or particular expertise, Outside Counsel are retained. The following factors are considered in determining whether outside legal services should be obtained:

1. *Staff Workload* -- A matter is referred to Outside Counsel only if it is not possible to utilize sufficient in-house staff from any Legal Division source, including an LSO for the relevant geographical area. Even under these circumstances, co-counsel relationships are utilized if possible in order to augment staff resources rather than substitute for them.
2. *Timeliness* -- If staff attorneys in the referring FDIC office are not able to respond in a timely fashion to court-ordered or other deadlines and the matter falls outside the geographical area of an LSO, Outside Counsel are retained for the particular matter.
3. *Cost Effectiveness* -- All Service Centers, Regional offices and appropriate Washington, D.C. sections review ongoing legal matters with Outside Counsel to determine which matters are appropriate to bring in-house.
4. *Staff Expertise* -- The Legal Division continues to maintain expertise in all areas of financial institution law, especially with respect to issues unique to the FDIC. If a matter is not within the FDIC's staff expertise, it is referred to Outside Counsel.

Use of In-House Legal Staff and Retention of Outside Counsel (cont.)

5. *Case/Matter Type* -- FDIC attorneys handle both complex and routine matters. Therefore, before retaining Outside Counsel, staff development needs are considered.
6. *Geographic Location* -- The geographic location of the asset or venue of the court proceeding is considered.

Selecting Outside Counsel

If it is necessary to refer matters to Outside Counsel for legal services, selection of counsel is made in a manner to ensure the highest quality of representation at the most economical cost, while promoting the use of minority- and women-owned firms. To that end, the minority and women coordinator participates in any final decision on the selection and retention of Outside Counsel.

The selection of Outside Counsel is accomplished using primarily two methods: non-competitive contracting (i.e., sole-sourcing) or competitive contracting. A non-competitive contract for legal services is defined as the award of a legal referral when only one private attorney, law firm, or service provider is considered. While the preferred method of selecting Outside Counsel is through competitive contracting, circumstances may exist when competition is impossible or impractical. Those circumstances include, but are not limited to, time sensitive matters (e.g., insufficient time to conduct competition in order to meet court-ordered or other deadlines), matters in which only one law firm maintains specific knowledge of that matter, and confidential matters.

Competitive contracting is defined as a method in which not fewer than three firms are considered for each matter. In addition, certain circumstances may exist that represent a continuation of work on a matter by the same individual(s) or law firm(s). These circumstances are deemed to be competitive contracting for the purposes of this policy, and they include, but are not limited to, matters handled by inherited counsel, matters handled by Outside Counsel that change their tax identification numbers or reorganize, or matters requiring transfer as a result of the dissolution of a law firm.

In the case of either non-competitive or competitive contracts for legal services, the FDIC List of Counsel Available (LCA) provides the major source for identifying firms for consideration. Although non-LCA firms may be considered, such firms must satisfy the requirements for inclusion on the LCA and execute a Legal Services Agreement (LSA) before the engagement begins. These requirements are described in the **Guide for Outside Counsel**.

Selecting Outside Counsel (cont.)

The following factors constitute the basis for selecting one firm from among those considered for retention. No one factor is dispositive. Rather, all factors contribute to the final decision of which firm to retain or whether to continue the retention of inherited counsel.

1. *Cap Policy* – Are FDIC payments to the firm in excess of or approaching the limits established for eligibility to receive referrals of new matters?
2. *Capacity* – Does the firm have the numbers, as well as type, of professional and support staff to perform the work anticipated? Does the firm's staffing allow it to adapt to shifts in the amount and type of staff needed during the course of the case?
3. *Cost* – In comparison to other firms available, are the firm's rates competitive, offering the best possible service for the lowest available cost? As stated in the **Guide for Outside Counsel**, the FDIC expects to receive a discount from Outside Counsel's usual rate structure. Furthermore, competitive bidding and alternative fee arrangements may be employed for routine representations.
4. *Expertise* – Does the firm's experience and knowledge coincide with the type of legal work to be performed? Does it generally understand issues related to representing the FDIC as a federal agency? Note that this information is contained in law firm's Prospective Law Firm Data Request, which is required as part of its LCA application.
5. *Geographic Location* – Is the firm proximate to the geographic area in which the matter arises or, if appropriate, to the FDIC office requiring legal service? Localizing firm selection will enhance staff's ability to monitor case status and minimize travel and expenses. Moreover, the Division seeks diverse representation in order to avoid over-reliance on any single firm or group of firms in a geographic area.
6. *Lack of Conflicts* – Has the firm conducted a detailed review for and scrupulously reported any existing or potential conflicts of interest? In addition to directly questioning the firm, staff will review the firm's conflict of interest disclosure sheet submitted as part of its LCA application. Note that any conflicts of interest (except those waived when the firm was added to the LCA or when it entered into an LSA) must be submitted to the FDIC Outside Counsel Conflicts Committee for a waiver request before any new work or continuation of work is permitted.

Selecting Outside Counsel (cont.)

7. *Minority/Women Information* – Is there a minority or woman-owned firm (MWOLF) available for retention? If not, has the majority-owned firm agreed to assign FDIC work to its minority and women attorneys and paraprofessionals or to joint venture or co-counsel with a minority or woman owned firm?
8. *Reputation* – If the firm has previously worked for the FDIC, does it have a verifiable reputation for competence, integrity, cost effectiveness and cooperativeness? Results of staff evaluations and Office of the Inspector General (OIG) audits of the firm, if available, are considered.

Documenting Selection and Retention of Outside Counsel

Both the decision to refer a matter to Outside Counsel and the choice of counsel are documented in writing. The form used for documentation may be defined by the Associate General Counsel, Assistant General Counsel, or Regional Counsel, as appropriate, for each branch, section or location within the Division and may vary depending on the nature of the work.

When a matter is to be referred to Outside Counsel, the FDIC provides the following information:

1. Bank or thrift name, location, and financial institution number
2. Basis for referring to Outside Counsel, in accordance with this policy
3. Type of matter
4. Type of referral (i.e., competitive or non-competitive)
5. If non-competitive, the identity of the firm and the basis for not competing
6. If competitive, the identity of firms considered for retention and the basis for proposing retention of the subject firm, including a summary comparison of each of the three or more firms considered, with the exception of those circumstances that represent a continuation of work on a matter
7. Signature of a senior manager with the appropriate delegated authority, indicating approval of the firm proposed and the basis for the proposal.

Minority and Women Outreach

Each Legal Division office that utilizes Outside Counsel designates a minority and women Outreach Coordinator. The Outreach Coordinators are Legal Division staff who perform outreach activities for the Minority and Women Outreach Program (MWOP), and act as liaison between the FDIC and the public on MWOP issues. Outreach activities include the identification of MWOLFs and minority and women attorneys in majority-owned firms who seek to provide legal services to the FDIC. Outreach Coordinators also distribute information concerning MWOLFs and minority and women attorneys in majority firms to Legal Division staff, and provide the appropriate forms for use by MWOLFs and minority and women attorneys seeking to represent the FDIC.

Prior to retention of Outside Counsel, whenever practicable, the designated senior Legal Division manager(s) or the LSC reviews, at a minimum, the following documentation to satisfy all internal control requirements:

1. Documentation which addresses the factors outlined in the first section of this policy, entitled “Use of In-House Legal Staff and Retention of Outside Counsel”
2. In the case of non-competitive contracting, documentation which states why one law firm was considered; or in the case of competitive contracting, documentation which states the three law firms that were considered or which states that the matter represents a continuation of work, and addresses the factors outlined in this policy
3. Documentation which demonstrates that the referral is being made in accordance with authority set forth in the Delegations of Authority.